No. 14035

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DWIGHT RICHARD BUTTERFIELD,
Petitioner-Appellant,

vs.

FRED T. WILKINSON, Warden,
United States Penitentiary,
McNeil Island, Washington,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE EDWARD P. MURPHY, *Judge*
Sitting by Assignment

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellee

Office and Post Office Address:
324 Federal Building
Tacoma 2, Washington

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STATEMENT OF PLEADINGS AND FACTS

Appellant on January 10, 1953, lodged with the Clerk of the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus, praying to be released from imprisonment in the above named insti-

tution, for the alleged reason that his several sentences mentioned therein were and should be considered concurrent and that having served the greater in length he should be released from imprisonment. (R. 1-35).

To the Writ of Habeas Corpus issued on April 6, 1953, returnable April 11, 1953, appellee served and filed his Motion to Dismiss on April 10, 1953, together with his memorandum in support thereof. (R. 36-45).

Thereafter on return day, April 11,1953, the appellant herein being represented by Harry Sager, counsel appointed by the Court, and counsel for the respondent being present, the Court heard the argument of respective counsel upon the issues of law herein raised by respondent's motion, and having determined there was no necessity for taking testimony, took the matter, as submitted, under advisement, (R. 46-70), and in the meantime remanding appellant to the custody of the warden.

Thereafter, on April 22, 1953, the Judge of the District Court made and signed a memorandum opinion on the legal issues involved and an order included therewith discharging the writ, which memorandum opinion and order was filed with and entered by the Clerk of the Court on April 25, 1953 (R.71-72).

Thereafter on May 11, 1953, appellant filed his Motion for Rehearing (R. 73-81), which was denied by Order of the Court dated May 14, 1953, and entered May 18, 1953. (R.82).

From the final order made April 22, 1953, the appellant has been permitted to appeal. (R. 83-86).

The facts material to a determination of appellant's right to discharge from present confinement, as disclosed in the record (R. 71), may be summarized as follows:

On September 26, 1949, appellant pleaded guilty to a violation of Title 18 U.S.C., Section 2312, and was sentenced in the United States District Court for the District of New Mexico to three years imprisonment. On the same date, appellant pleaded guilty in the same court to a violation of Title 18 U.S.C., Section 751 and was sentenced to two years imprisonment, the sentence reading: "Two (2) years, said prison sentence imposed to begin and run consecutively with the prison sentence of three (3) years this day imposed against said defendant in Cause No. 15107 on the Criminal Docket of this Court." On October 26, 1949, appellant was sentenced to two years imprisonment by the United States District Court for the Northern District of Texas, Amarillo Division, for another violation of Title 18 U.S.C.,

Section 751, the sentence reading: "* * * two years, said sentence to be cumulative with sentence in other cases." Having served his three year sentence in full, appellant sought his release from McNeil Island Penitentiary where he was at the time thereof confined, contending that both two year sentences imposed on him must be interpreted to run concurrently with the three year sentence already served.

QUESTION PRESENTED

Where appellant received two sentences, the second providing it was to begin and run consecutively with the first, does the determination of the corrected meaning of whether said sentences are to be served concurrently or consecutively come within the province of a habeas corpus court?

ARGUMENT AND AUTHORITIES

Title 28 U.S.C., Section 2255, in pertinent part here, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court

which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * *

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Section 114, 63 Stat. 105."

The above law of procedure became effective September 1, 1948. Prior to its enactment this Court

in the case of *Bledsoe v. Johnston*, 154 F. (2d) 458, had affirmed the District Court's decision in *Bledsoe v. Johnston*, 61 F. Supp. 707.

At page 708 of the latter, it is stated:

> "It is the contention of petitioner that the sentences as set forth in the minute order and the judgments and commitments were to run concurrently, and therefore there was nothing for the Texas District Court to correct. I think, and so held in *Bledsoe v. Johnston*, 58 F. Supp. 129, supra, that the record produced an ambiguity, and that it was proper that it be corrected to show the truth; that is, *the actual sentences imposed orally in the presence of petitioner. Buie v. United States*, 5 Cir. 127 F. (2d.) 367; *Downey v. United States*, 67 App. D.C. 192, 91 F. (2d) 223." (Emphasis ours.)

The foregoing is an answer to the argument of opposing counsel below, namely, that appellant's sentences were valid concurrent sentences. (R. 55-58, 67-69.)

The District Court in Bledsoe's first application, *Bledsoe v. Johnston*, 58 F. Supp. 129, at page 131, had decided:

> "The sentences here are ambigious and should be corrected to show whether they are to run concurrently or consecutively. The language of the commitments in each case reads 'consecutive with' the sentence imposed this day. A sentence is not 'consecutive with,' it is 'consecutive to' another sentence. Consecutive means successive,

following in a regular train; succeeding one another in regular order. Webster's New International Dictionary. The preposition 'with' is correctly used in the phrase 'concurrent with,' which is the way that it is used in the docket entry. Furthermore, it cannot be determined in this case which sentence is to follow which.

"Since, by the test of reasonableness, it cannot be determined what the intent of the trial court was, I am constrained to hold that in conformity with the rule mentioned in Re Bonner, 151 U.S. 242, 261, 14 S. Ct. 323, 38 L. Ed. 149, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Texas, Paris Division, for further action by that Court."

The foregoing should correct the erroneous conception appearing at page 67 of the Record to the effect that the Bledsoe sentences were corrected before the habeas corpus petition was filed. (R. 67-69). Two petitions were filed, and the correction was made after the first filing and remanding, as stated in the appellate decision at page 459:

"However, here Bledsoe was returned to the District Court for the Eastern District of Texas and a hearing was had for correction of the judgments before the same judge who signed the sentences on December 11, 1939. Evidence was there introduced of the docket sheets kept by both the clerk and the judge at the time the sentences were pronounced. They were all made on December 11, 1939, and show a sentence of five years in case No. 1335, and of five years cumulative in case No. 1166. Upon this docket

> sheet evidence the judgment in No. 1335 was amended to read for a sentence of five years and the judgment in No. 1166 for five years to run 'consecutive to the sentence for five years in criminal No. 1335.' "

The enactment of Title 28, U.S.C., Section 2255, afforded a procedure in such instances of correction of ambiguous sentences, which not only rendered the application to a habeas corpus court and the resulting remand to the sentencing court unnecessary, but which made its procedure by motion exclusive, in such instance, without resort to habeas corpus.

See *Jones v. Squier*, 195 F. (2d) 179; *Winhoven v. Swope*, 195 F. (2d) 181.

Counsel below for appellant would place the obligation of construing ambiguous sentences upon the Warden in order to by-pass the effect of Section 2255. (R. 57)

While it might be generally true that habeas corpus would lie only where the applicant was entitled to release, and such did not arise in this instance until the three year sentence was served, still that would not have prevented a motion under Sec. 2255 when that section expressly declares such "motion * * * may be made at any time." See in this connection *Holloway v. United States*, 191 F. (2d) 504, 507.

This motion is not to be confused with any motion under the criminal rules of the Court. Nor does the law declare that the motion must be made at the time of imposition of sentence or that it cannot be made after service of another sentence. As stated in *Barrett v. Hunter*, 180 F. (2d) 510 514:

> "The grounds for a motion to vacate, (set aside or correct the sentence), under Sec. 2255, encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated on facts that existed *at* or prior to *the time of the imposition of sentence.*" (Emphasis ours.)

Counsel below would appear to contend that the ambiguity of the second sentence never arose until the Warden construed it as requiring further imprisonment, (R. 57), and as a consequence it cannot be said to parallel "an application for a writ of habeas corpus predicated on facts that existed at or prior to the time of the imposition of sentence."

However, prior to making such contention counsel below was engaged (R. 50-54) in discussing the meaning of "consecutively with" and the intention of the sentencing court in the use of such terms, which were certainly "facts that existed at or prior to the time of the imposition of sentence." And the fact that the Warden placed upon them one construction and

the appellant another did not postpone their ambiguity until such moment.

There is a reasonable conflict of rulings in the construction of such terms as "consecutively with" or "consecutive with", as shown by the various decisions.

> See *Hiatt v. Ellis*, 5th Cir., 192 F. (2d) 119;
> *Boyd v. Archer*, 9th Cir., 42 F. (2d) 43;
> *Gillenwaters v. Biddle*, 8th Cir., 18 F. (2d) 206;
> *Waldon v. United States* (E.D. Ill.) 84 F. Supp. 449.

In the foregoing cases the word "consecutive" or "consecutively" with or without the proper preposition appears to be sufficient to identify the sentence in question as to be served consecutively to the other referred to, but in the following cases the preposition "with" was held to do violence to the meaning of consecutiveness:

> *Bledsoe v. Johnston*, 9th Cir., 154 F. (2d) 458;
> *U. S. ex rel Chasteen v. Denemark*, 7th Cir., 138 F. (2d) 289.

In the light of such conflict and if the burden of construction was placed on the warden, as counsel below for appellant has suggested, the Government would be placed in the strange position of freeing or imprisoning persons so sentenced, pursuant to the nature of construction placed upon such terms by the courts in the particular circuit wherein the place of

confinement was located and to which persons thus sentenced were transported for imprisonment.

CONCLUSION

For the reasons hereinabove stated, it must be contended that the decision below should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney
Attorneys for Appellee